TREATY-MAKING POWER AS SUPPORT FOR FEDERAL LEGISLATION

The efficacy of the treaty-making power to sustain federal legislation otherwise unconstitutional has again been strikingly illustrated by the recent history of the Migratory Bird Act.

On March 4, 1913, Congress included in the Agricultural Department Appropriation Act[1] the provisions of the so-called Weeks-McLean Migratory Bird Act declaring certain migratory birds "within the custody and protection of the government of the United States," prohibiting their destruction contrary to regulations which the Department of Agriculture was authorized to adopt to give effect to the Act. The endeavor to enforce the Act at once brought its constitutionality into issue, and two state supreme courts and two lower federal courts during 1914 and 1915 held the Act unconstitutional.[2] An appeal from one of the federal decisions, the *Shauver* case, was carried to the United States Supreme Court, where it was twice argued. On the first argument, before a bench of only six judges, there was evidently a division of opinion making a decision favorable to the Act impossible, or else the case seemed sufficiently important to induce the Court to order it re-argued before a full bench. After the re-argument early in 1916 the Department of Agriculture, apparently fearing an adverse decision, evidently hastened to urge upon the Department of State the necessity of concluding a treaty with Canada protecting migratory birds, and within a short time, on August 16, 1916, a treaty covering much the same ground as the Act of 1913 was concluded.[3] The Supreme Court never decided the *Shauver* case. On July 3, 1918, Congress enacted the Migratory Birds Treaty Act[4] to carry further into effect the treaty of 1916 and under it the Department of Agriculture has from time to time issued enforcing regulations. The constitutionality of the Act of 1918 having again been contested on its enforcement, four federal courts, including the district court for the Eastern Arkansas District which had held the 1913 Act unconstitutional, have now uniformly held the 1918 Act constitutional.[5] Thus, the interposition of an underlying treaty has saved federal legislation, otherwise manifestly unconstitutional, from nullity.

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[1] 37 Stat. L. 847.

[2] *United States v. Shauver* (1914, E. D. Ark.) 214 Fed. 154 (opinion by Judge Trieber); *United States v. McCullagh* (1915, Kan. 1st) 221 Fed. 288; *State v. Sawyer* (1915) 113 Me. 458, 94 Atl. 886; L. R. A. 1915F 1031, note; *State v. McCullagh* (1915) 96 Kan. 786, 153 Pac. 557. The Act was upheld in an unreported decision of a federal district court in South Dakota, mentioned in 17 DOCKET, 1476.

[3] 39 Stat. L. 1702.

[4] 40 Stat. L. 755.

[5] *United States v. Thompson* (1919, E. D. Ark.) 258 Fed. 257 (opinion by Judge Trieber); *United States v. Samples* (1919, W. D. Mo.) 258 Fed. 479; *United States v. Selkirk* (1919, S. D. Texas) 258 Fed. 775; *United States v. Rockefeller* (1919, D. Mont.) 260 Fed. 346.

The general recognition, by the courts construing the original Act, that the protection of migratory birds so essential to agriculture was an eminently useful and desirable federal function, physically impossible of adequate performance by the states, did not prevent them from holding practically uniformly that there was no authority in the federal Constitution, express or implied, to sustain such an assumption of federal legislative power. Able and ingenious arguments failed to convince. The statutory declaration that the birds were within the "custody and protection of the government of the United States" and therefore "property of the United States" within the meaning of Article 4, section 3, paragraph 2 of the Constitution conferring on Congress power to make all needful rules "respecting the territory or other property belonging to the United States" (erroneously denominated by two of the courts as the "general welfare" clause) was opposed by the opinion of the United States Supreme Court in *Geer v. Connecticut*[6] and other cases to the effect that wild game in a state, at common law, belonged to the sovereign, which in this country means, to the people of the state, for whom the state is the trustee. True, when the *Geer* case was decided, no theory of divided ownership between state and federal government was in contemplation. The attempt to sustain the original Act under the commerce clause which had successfully supported federal legislation in prohibition of white slavery,[7] lottery tickets,[8] impure foods and drugs,[9] and the liquor traffic,[10] was met by the assertion that such commerce or migration was always the result of human agency, and even more squarely by the *Geer* decision that the power of the state was not terminated by the act of an individual in reducing the game to possession, but that the state could control its disposition so as to prevent its coming under the protection and control of the commerce clause.[11] Incidentally, the exercise of a federal police power as an implied power, while admitted, was held necessarily to attach to some grant of express power, and the

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[6] (1896) 161 U. S. 519, 16 Sup. Ct. 600. See also *Silz v. Hesterberg* (1908) 211 U. S. 31, 29 Sup. Ct. 10; *Patsone v. United States* (1914) 232 U. S. 138, 34 Sup. Ct. 281.

[7] Act of June 25, 1910, 36 Stat. L. 825; *Hoke v. United States* (1913) 227 U. S. 308, 33 Sup. Ct. 281.

[8] Act of March 2, 1895, 28 Stat. L. 963; *Champion v. Ames, Lottery Case* (1903) 188 U. S. 321, 23 Sup. Ct. 321.

[9] Act of June 30, 1906, 34 Stat. L. 768; *Seven Cases v. United States* (1916) 239 U. S. 510, 36 Sup. Ct. 190.

[10] Act of March 1, 1913, 37 Stat. L. 699; *Clarke Distilling Co. v. Western Maryland Ry. Co.* (1917) 242 U. S. 311, 37 Sup. Ct. 180.

[11] As a constitutional argument, this reason is not altogether convincing, for Congress may exercise power over numerous objects of state "ownership," such as forests, waters, etc. *Georgia v. Tennessee Copper Co.* (1907) 206 U. S. 230, 27 Sup. Ct. 618; *Hudson County Water Co. v. McCarter* (1908) 209 U. S. 349, 28 Sup. Ct. 529.

police power over the taking of birds was deemed to vest solely in the states.[12] Other arguments were employed: e. g., that the federal power over navigable waters required the preservation of forests, and that the protection of migratory birds which attacked destructive insect life was necessary and proper to this end; that the protection of the national forests alone sustained the legislation; that "property" in the state does not exclude federal "ownership" or control, any more than such ownership would be excluded in a new island arising within the three-mile limit of a state; that there is some kind of "title" in the expectancy that the birds will normally come into the country or state which justifies repressive measures in distant states against those impairing this normal ingress, in analogy to the riparian owner's interest in preventing abnormal interference by upper owners with the fish coming down the stream.

These arguments being apparently insufficient to convince the majority of the United States Supreme Court, federal legislation for the protection of migratory birds, it seemed, would have to rely upon a constitutional amendment or upon a treaty. A treaty with Canada was, therefore, promptly concluded and in so far as it was not self-executing, the Act of July 3, 1918 and regulations thereunder were designed to carry it into effect. The argument of the defendants, prosecuted for violation of the Act,[13] rested principally on the assumption that the want of power to enact federal legislation on the subject likewise operated to invalidate the treaty. The misconception was promptly dispelled. An able opinion by Judge Trieber sustaining the Act in the *Thompson* case[14] is based on unassailable authority. While the Constitution limits the power of Congress to laws "made in pursuance of" the Constitution, the power over treaties is seemingly not so limited, for Article 6, clause 2 merely provides that "all treaties made, or which shall be made, *under the authority of the United States,* shall be the supreme law of the land." This does not necessarily mean that the treaty-making power is without limitation, but it does probably mean that any matter properly the subject of negotiation with a foreign government is within its scope. How far its subject-matter is limited, if at all, by the Constitution, is exceedingly doubtful. Mr. Justice Field in a celebrated *dictum* in *Geofroy v. Riggs* said that it was

"unlimited, except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the states. It would not be contended that it extends so far as to

[12] See also Brewer, J. in *Kansas v. Colorado* (1906) 206 U. S. 46, 89, 27 Sup. Ct. 655.

[13] See note 5, *supra.*

[14] (1919, E. D. Ark.) 258 Fed. 257.

authorize what the Constitution forbids, or a change in the character of the government or in that of one of the states, or a cession of any portion of the territory of the latter, without its consent."[15]

It might well be contended, however, that a compulsory cession of state territory as the result of a disastrous war would not be invalidated by the absence of a state's consent. Thus far no treaty has been held unconstitutional. Probably, we could never plead constitutional disability against a foreign government unwilling to release us from a treaty obligation, unless that government could be charged with knowledge of the disability, a circumstance hardly conceivable if we actually concluded the treaty. Certainly, no subsequent change of constitution can impair the validity or operation of a treaty duly concluded or of an international obligation apart from treaty.[16]

The supremacy of treaties in our law, both constitutional and international, has been amply demonstrated on numerous occasions. Since the early case of *Ware v. Hylton*,[17] in which the Treaty of Peace of 1783, empowering British creditors to recover their American debts, was held to render inoperative a Virginia statute of 1777 confiscating such debts, there has never been any doubt that the federal government, under the treaty-making power, could take out of the control of the states matters otherwise solely within the jurisdiction of state legislation. That power has been exercised with reference to the ownership and devolution of real estate, state statutes of limitation, the removal of disabilities and discriminations against aliens by way of taxation, engagement in certain occupations, such as fishing, residence in particular places, suit by non-resident aliens under state statutes granting an action for injuries causing death, consular administration of alien decedents' estates and many other subjects.[18] Even as to federal legislation, the treaty is supreme so far as applicable. This

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[15] (1890) 133 U. S. 258, 267, 10 Sup. Ct. 295, 297.

[16] The current dispute with Mexico is in part based upon the alleged incompatibility between article 27 of the Mexican constitution and Mexico's international obligations with respect to American citizens. See also, Borchard, *Diplomatic Protection of Citizens Abroad* (1915) secs. 390ff.

[17] (1796, U. S.) 3 Dallas, 199.

[18] The treaties and cases are discussed by Crandall, *Treaties, Their Making and Enforcement*, (2d ed. 1916) secs. 105-109. See also the Treaty with Italy, Feb. 25, 1913, *Malloy's Treaties, Charles' Supplement* (1913) 442, nullifying with respect to Italian subjects the effect of a Pennsylvania statute upheld by the Supreme Court in *Maiorano v. Baltimore & Ohio R. R.* (1909) 213 U. S. 268, 272, 29 Sup. Ct. 424. See also *United States v. Thompson, supra*, 220ff. While the advocates of "States rights" like Mr. Henry St. George Tucker contend that such treaties merely change the status of the alien with respect to the law of the state rather than suspend the operation of the state law, it is hardly doubtful that to the extent of the exercise of the treaty-power such legislation becomes automatically inoperative. Tucker, *Limitations on the Treaty-Making Power* (1915) 143ff.

was illustrated recently when a Spanish declarant, held for evasion of the Selective Draft Act of 1917, claimed exemption from military service under the prior treaty of 1903 between the United States and Spain. Although the courts had to hold the later statute controlling,[19] the President, on a representation from the Spanish Ambassador, recognized the superior binding character of the treaty by ordering the Spaniard's release from the service.[20]

It is within the power of the federal government by treaty to remove from state control any matter which may become the subject of negotiation with a foreign government. With the continued drawing together of the world by increased facilities for travel and communication, the subjects of common interest which require international regulation will continue to grow in extent and variety. Uniformity of legislation by withdrawal from state legislative control of such subjects as marriage and divorce, labor legislation, the ownership and inheritance of property, and all matters affecting aliens would be possible by the exertion of the necessary federal treaty power. That it has not been more indiscriminately exercised is due to the unwillingness of the Department of State, or lack of confidence in the disposition of the Senate, to interfere unnecessarily with state control and thus bring about undesirable political controversy. The advances of foreign governments looking to the conclusion of treaties on particular subjects such as corporation law, the ownership of real estate, etc., now ordinarily controlled by state legislation have, therefore, usually been rejected on the ground that it would be inexpedient for the federal government to remove such matters from state control. It would not have been difficult as a matter of law to settle the Japanese land controversy in California in 1913, had it not been otherwise adjusted, by the conclusion of a treaty nullifying the obnoxious law (assuming two-thirds of the Senate would have concurred), but politically it would not have been wise to antagonize the people of the Pacific coast. And yet, while the treaty-making power confers many rights on aliens, the fact that the enforcement of those rights is so often within the jurisdiction of the states, over whom the federal government has no effective control, has compelled this government on numerous occasions to pay heavy indemnities to foreign governments by reason of its inability to enforce the promises of protection, etc., made in its treaties. This embarrassing situation should be remedied by the enactment of legislation enabling the federal government to enforce the treaty rights of aliens in the federal courts.

E. M. B.

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[19] *Cherokee Tobacco Cases* (1870, U. S.) 11 Wall. 616; *Head Money Cases* (1884) 112 U. S. 580, 598, 5 Sup. Ct. 247.

[20] *Ex parte Larrucea* (1917, S. D. Cal.) 249 Fed. 981, (1918) 28 YALE LAW JOURNAL, 83.